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BEFORE THE
SURFACE TRANSPORTAION BOARD

STB Docket No. MC-F-21035

STAGECOACH GROUP PLC AND COACH USA, INC., ET AL. – ACQUISITION OF CONTROL–TWIN AMERICA, LLC

STATE OF NEW YORK'S REPLY IN OPPOSITION TO APPLICANTS' PETITION FOR RECONSIDERATION

PREFACE

The State of New York, by its Attorney General, Eric T. Schneiderman, ("New York") respectfully submits its Reply in Opposition to Applicants' Petition for Reconsideration ("Reply") to the Surface Transportation Board's (the "Board's") decision of February 8, 2011 ("Decision").

Applicants' Petition for Reconsideration ("Petition") should be denied and the Board's order effectuated immediately.

The Board found the Applicants' joint venture to be anticompetitive and therefore not in the public interest. The Board also found that any supposed efficiencies gained by the joint venture do not outweigh the anticompetitive effects. Applicants fail to show that the Board committed "material error" in its Decision and rehash the same arguments the Board rejected.

The parties were heard on the issues Applicants claim to be material error, evidence was submitted by the parties and the Board heard oral argument and applied the proper legal standards in reaching its decision.[1] The Board fully explained its decision on the issues of relevant market,

[1] The unverifiable Verified Statements of Professor Willig and Messrs. Marmustein and Kinnear should be disregarded for two reasons. First, the Verified Statement of Professor Willig reargues the same points regarding market definition previously advanced by Applicants and rejected by the Board. The Verified Statements of Messrs. Marmurstein and Kinnear "address the consequences of the proposed divestiture"

market power, and entry under well settled antitrust principles and correctly concluded that dissolution - a remedy the parties to the joint venture themselves provided for was warranted.

The Board did not commit material error when, in its discretion, it ordered the most effective remedy available to redress the anticompetitive harm. As the Supreme Court stated in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962), divestiture is the "most effective" remedy. Dissolution is appropriate because the formation of the combined entity, Twin America, is the violation itself. The alternative remedies Applicants propose fall far short of addressing the actual violation, the combination itself.

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and do not show material error. Second, the National Labor Relations Board ("NLRB") decision of June 28, 2010 found many contradictory statements in the Verified Statements of Professor Willig and Mr. Marmurstein submitted to the Surface Transportation Board concerning key points such as consolidation, warehousing in common locations, and "cross-ticketing," as well as other points. State of New York's July 16, 2010 filing, attached NLRB decision.

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ARGUMENT

I. APPLICANTS FAIL TO SHOW MATERIAL ERROR IN THE BOARD'S FINDING THAT TWIN AMERICA'S JOINT VENTURE IS INCONSISTENT WITH THE PUBLIC INTEREST.

Under 49 U.S.C 722(c) and 49 C.F.R. 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances, or (2) involves material error. Applicants here allege only material error and fail to show any "material error" on which reconsideration might be based. *See* 49 C.F.R. § 1115.3 (b)(2) (requiring a showing of "material error" in the prior action).

Instead, Applicants reargue the same points already addressed by the Board and support their Petition with unverifiable statements. Applicants first argue that the Board narrowly defined the relevant market as "double-decker, hop-on, hop-off bus tours" in New York City and relied on Twin America's 2009 price increase as evidence of pricing power. Petition at 3. But the relevant market was the same one assumed by the Applicants in their own internal documents. Twin America's price increase and reductions in commissions to third parties was the result of an agreement between Gray Line and City Sights prior to the merger, not unilateral. Even if City

Sights had unilaterally determined to raise its prices, it might not have done so without the support of its closest competitor. That no further price increases have taken place may reflect the fact that the transaction is under scrutiny, not efficiencies. Petition at 9. The issues of relevant market, power to raise prices above competitive levels,[2] and lack of entry were all considered by the Board under well settled antitrust principles. The Board's Decision was fully supported by the record, the submissions of the parties and oral argument.

Next, Applicants argue that the Board committed material error regarding the issue of entry. Applicants focus on the use of "mature" in the Board's decision as material error. Petition at 4. The Board fully addressed the issue of entry barriers and Applicants have made no contrary showing. Decision at 13-16. Applicants concession that "even double-decker bus tours in New York City were over a decade old when City Sights entered the market in 2005" only strengthens the Board's decision. Petition at 4. Whether the market is characterized as "old," "older," "mature," or "more mature" is not material error. The Board's Decision makes clear that over the passage of time, both Gray Line and City Sights have absorbed a significant part of New York City demand and consumed street capacity and that several significant factors now exist in limiting new entrants, including the combined size and resources of the merged firm.

II. THE BOARD DID NOT COMMIT MATERIAL ERROR IN ORDERING THE MOST EFFECTIVE REMEDY

The Board found the Twin America transaction to be anticompetitive and ordered its dissolution. There was no material error by the Board in ordering the most effective and appropriate remedy for the formation of an anticompetitive joint venture. Nothing short of dissolution can as effectively remedy the anticompetitive harm. As the Supreme Court noted. "[w]here the unlawful control is the result of an acquisition, divestiture may be the only effective remedy." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129 (1962)..

[2] *See* Sur-Reply of NYSAG, February 1, 2010, Verified Statement of Dr. Kitty Kay Chan, Exhibit 2.

Far from being disproportionate, dissolution was contemplated by the Applicants.[3] In fact, Applicants' own economist explains why the Applicants specifically included a dissolution clause in the joint venture agreement.[4] Dissolution can therefore occur through a dissolution mechanism already in place.

Dissolution is proper "where the creation of the combination is the violation itself." *United States v. Crescent Amusement*, 323 U.S. 173, 189 (1944) (citing cases). The violation here is the consolidation which gives the two previously separate entities joint pricing and operating power. Although Applicants portray the unwinding or dissolution of a joint venture as some draconian form of punishment, "[m]ore recently, 'divestiture' and 'dissolution' have been treated as more or less interchangeable terms, and the meaning is typically much closer to the historical 'divestiture,' rather than dissolution." 4A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 118 (3d ed. 2009).[5]

To the extent the Board finds that Applicants were entitled to a further opportunity to present alternative remedies, they have had it -- they have outlined the alternative remedies they would present to the Board in their Petition for Stay and Petition for Reconsideration. But these alternative remedies do not address the fundamental antitrust violation, the joint venture entity itself. The Board is not required to exhaustively consider all possible remedies. The remedy that the Board has ordered -- as an alternative which the Applicants may themselves select -- has plainly been shown to be workable in the sense that it represents simply a return to the status quo prior to the illegal combination. In its discretion and authority, the Board may reasonably find, as

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[3] Sur-Reply of NYSAG, February 1, 2010, Exhibit 1, Joint Venture Agreement at 26, Section VII.

[4] Reply of Applicants to Sur-Reply, March 10, 2010, Verified Statement of Prof. Robert D. Willig at 3, ¶10

[5] Applicants partially quote Areeda & Hovenkamp, Petition at 7. The full quote says, "Divestiture should be distinguished from dissolution, a far more aggressive remedy that can actually take away a corporation's charter and require it to sell off all its assets, thus destroying it." 4A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 117 (3d ed. 2009)

it did here, that divestiture – restoration of the status quo prior to the illegal combination -- is an effective remedy.

Applicants' arguments concerning theoretical irreparable harm and hardship are not "material error" for which reconsideration can be granted. "[C]omplete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result." *United States v. E. I. DuPont de Nemours & Co.*, 366 U.S. 316, 326-327 (1961).

Applicants assert Twin America's so called "trade secrets and business strategies" are now commonly known by Gray Line and CitySights. Petition at 8. In other words, two former competitors now know each other's "trade secrets and business strategies." In that respect, they will be on an equal footing after the dissolution.

Applicants assert that their "significant economic investment is jeopardized by the Board's decision." Petition at 6. Applicants should not now be heard to argue that actions which they have taken since the formation of the joint venture bar divestiture. Applicants present this transaction as a *fait accompli* by alleging that the joint venture cannot be unwound because "such restoration cannot be achieved because of subsequent events." Petition at 8. Applicants cannot now profit from acts which the STB had not approved and indeed ordered Applicants not to perform.

Gilbertville Trucking has no application here. In that case, the trial examiner made no findings or recommendations on a remedy for the violation and also on reconsideration, and there was no explanation by the Commission in its report. *Id.* at 129. In stark contrast, the Board here clearly sets forth findings, analysis and explanations in its Decision.

CONCLUSION

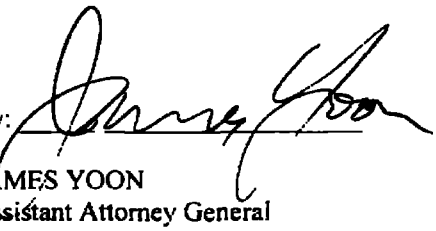
For the foregoing reasons, Applicants' Petition for Reconsideration should be denied. In the alternative, should the Board decide to grant reconsideration only as to remedy, it should reaffirm its findings as to the anticompetitive effects of the transaction.

DATED: March 21, 2011

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York

RIGHARD L. SCHWARTZ
Acting Chief, Antitrust Bureau

By: 

JAMES YOON
Assistant Attorney General
Antitrust Bureau
State of New York
Office of the Attorney General
Antitrust Bureau
120 Broadway, Suite 26C
New York, NY 10271
Tel: (212) 416-8822
Fax: (212) 416-6015

CERTIFICATE OF SERVICE

I certify that I have on this 21st day of March, 2011, served a copy of the foregoing Reply in Opposition to Applicants' Petition for Reconsideration by overnight courier to:

U.S. Department of Transportation
Office of the General Counsel
1200 New Jersey Avenue, S.E.
Washington, DC 20590

David H. Coburn
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

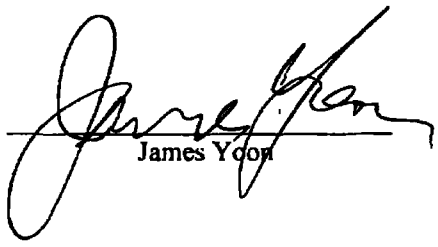
Director of Operations
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Washington, DC 20530

Mr. Richard Ventola
Transport Workers Union of America
10-20 Banta Place, Suite 118
Hackensack, NJ 07601

U.S. Department of Transportation
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Mark A. Berman
Ganfer & Shore, LLP
360 Lexington Avenue
New York, NY 10017

Michael P. A. Cohen
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005



James Yoon